Supreme Court of the United States

OCTOBER TERM, 1920.

Nos. 439 and 582

CHARLES I. DAWSON, ATTORNEY GENERAL OF THE STATE OF KENTUCKY, VICTOR A. BRADLEY, COMMONWEALTH'S ATTORNEY FOR THE FOURTEENTH JUDICIAL DISTRICT OF KENTUCKY, AND JOHN J. CRAIG, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF KENTUCKY, ... *Appellants,*

vs. 439

KENTUCKY DISTILLERIES & WAREHOUSE COMPANY, ... *Appellee.*

AND

CHARLES I. DAWSON, ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY, AND INDIVIDUALLY; LOUISVILLE PUBLIC WAREHOUSE COMPANY (A CORPORATION), JOHN J. CRAIG, AUDITOR OF THE COMMONWEALTH OF KENTUCKY, AND INDIVIDUALLY, . *Appellants.*

vs. 582

THE J. & A. FREIBURG COMPANY, ... *Appellee.*

PETITION FOR REHEARING.

We are aware that courts generally do not look with favor on petitions for rehearing, and that good practice demands that lawyers refrain from adding to the court's burdens by filing such petitions, except where something of vital concern can be offered for the court's

consideration. If we know how to value such matters we have three vital reasons to offer why the opinion of the court in these cases should be modified, if not withdrawn.

I.

The court in its opinion in these cases used this language:

> "The case comes here by direct appeal under section 238 of the Judicial Code."

The court evidently was laboring under the impression that final judgments had been entered in the district courts, and that appellants prosecuted appeals from these final judgments. As a matter of fact, the order granting the appeal in each case shows the appeals were taken from an order awarding an interlocutory injunction, as is provided by section 266 of the Judicial Code. The statement in the opinion to the effect that "The case comes here by direct appeal under section 238 of the Judicial Code" imports to the judgment a finality to which it is not entitled, and which in our view of it was not intended by the court. If allowed to stand as the opinion of the court on final appeal, it will lead to confusion in the district court upon the return of the cases, as well as in the state courts, where an action is now pending to test the validity of the statute. As we understand the law, the legality of a statute of a state under the State Constitution must finally be determined by the highest court of that state, and inasmuch as this court in its opinion tested the validity of the statute solely under the State Constitution, the appellants feel that they should not be embarrassed in the Court of Appeals of Kentucky by a final utterance of this court on the proposition, when the character of the appeal did not justify this court in treating it as a final appeal.

II.

We understand the rule to be that where an appeal is prosecuted under section 266 of the Code, from an order ganting or refusing an interlocutory injunction, and where the construction of a state statute as affected by the State Constitution is directly involved and the state court of last resort (as in these cases) has not construed the particular statute under consideration, but has sustained the validity of similar taxing statutes, the Supreme Court will assume that such a construction is broad and comprehensive enough to sustain the validity of the statute assailed. Pullman Co. v. Knott, 235 U. S. 27. In this case a Florida statute imposing a license tax was being assailed as a property tax. A preliminary injunction had been refused by three judges; an appeal was prosecuted under section 266 of the Judicial Code direct to the Supreme Court from the order refusing the interlocutory injunction. Mr. Justice Holmes, speaking for the court, said:

> "These considerations undoubtedly are very strong, but as we are dealing with the validity of the law under the State Constitution, a matter that must be decided finally by the State court, and as the State court has held other gross earning taxes to be license taxes (Afro-American Industrial & Benefit Association v. State, 61 Fla. 85-89, So. 383), we are of the opinion that if this act is to be overthrown it should not be overthrown by us. It is true that there are possible distinctions between this case and the Florida decisions cited, but it seems to us not improbable that the Supreme Court has in view a principle broad enough to cover the case at bar."

We fail to see any reason that can be logically urged against the general application of this rule in Federal procedure, but surely no reason can be asserted, logical or otherwise, against its application in a preliminary

hearing, where the decision is confined to the approval or disapproval of an interlocutory injunction.

The Kentucky Court of Appeals, in two well considered cases of comparatively recent date, was called upon to test the constitutionality of two statutes imposing an occupation tax very similar to the statute here assailed, in which it sustained the validity of said statutes, holding the tax imposed thereunder to be an occupation tax and not a property tax. In fact, one of the statutes construed imposed a license tax on the business of manufacturing distilled spirits and storing same in a bonded warehouse in this State. This statute was in its material provisions copied into the Vance Act. The validity of this statute had been upheld by the Court of Appeals of Kentucky long before the district courts granted the preliminary injunctions. (See Greene, Auditor v. E. H. Taylor, Jr. & Sons, 184 Ky. 739). A similar statute imposing a license tax on producers of oil, to be measured in the number of gallons of oil produced, as shown by the pipe line receipts, was sustained by the Court of Appeals in a well considered opinion in the case of Raydure v. Board of Supervisors of Estill County, 183 Ky., page 84. In the absence of a decision of the highest State court construing the particular statute in question, we submit that the decisions of said court sustaining the validity of similar taxing statutes should have been followed by the Supreme Court in determining the nature of this tax. It may be said to be the settled law in Kentucky that owning property in the State which was acquired for the purpose of making a profit, or to await a convenient season to put same to use, is doing business in the State which may be the subject of a license tax. Greene, Auditor v. Kentenia Coal Corporation, 175 Ky. 661.

Mr. Justice Brandeis, speaking for the court in the opinion, says:

> "Here we are concerned only with the taxes which are alleged to be on the business of owning, and storing such spirits in bonded warehouses. The question is whether as to such this fifty cents a gallon tax is an occupation or property tax."

We submit this is a restricted definition of the business taxed. The Legislature never intended to take parts of the business and impose a tax thereon without relation to the whole. The court has adopted a construction in this restricted definition which makes the law invalid, when the way was unobstructed for a broader definition which would have sustained its validity. It is elementary that where two views of the law appear from the language employed, one of which would uphold the law, the other of which would lead to its overthrow, the court will, if possible, adopt the view which will sustain the law. May we not insist that this canon of statutory construction has been reversed in the case at bar?

The opinion applies to the Kentucky Distilleries & Warehouse Company, as well as to The J. & A. Freiburg Company. It is conceded that the Distillery Company is one of the large manufacturers of distilled spirits in Kentucky, and that it yet owns and holds large quantities of liquor which it manufactured in this State and which is being held in its warehouses in Kentucky, fulfilling the dual purpose of undergoing the ripening or aging process and awaiting a propitious market. Can it be said (and does the court mean to say) as to the Distilleries Company, "We are only concerned here with taxes which are alleged to be on the business of owning and storing such spirits in bonded warehouses?" The fact that a part of the business has already been performed which is sought to be taxed does not invalidate the statute under either the State or Federal Constitution. Kentucky Union Company v. Kentucky, 219 U. S. 140.

III.

It is true the validity of this particular statute had not been passed upon by any Kentucky court at the time these cases were finally argued and submitted, but while the Supreme Court was recessed after its January Session, 1921, one of the Judges of the Kentucky Court of Appeals handed down an opinion in a case pending in the Franklin Circuit Court, wherein E. H. Taylor, Jr. & Sons was plaintiff and John J. Craig, et al., were defendants, dissolving a preliminary injunction granted by the Franklin Circuit Court, and in a learned and exhaustive opinion upheld the validity of the statute here assailed. This opinion not only interprets the statute in the light of section 181 of the Constitution, holding the tax imposed to be an occupation or license tax, but clearly defines the occupation sought to be taxed. The learned Justice reviews and collates the Kentucky authorities bearing on these questions, and as the question is one of "local law" and one that must finally be determined by the State courts, this opinion has a vital and important bearing on the question here for determination. This opinion was rendered February 18, 1921, and before these cases were decided by this court, but as the court was not in session, there was no way by which counsel could bring said decision to the court's attention. We deem it proper in this connection to state that notice was given to opposing counsel that the opinion of the Kentucky Judge would be offered in open court on February 28, 1921, and counsel were in court on said date prepared to make this motion pursuant to the notice, but this court's opinion was delivered at the convening of the court on said day, and before motions were had. The opinion of the Judge of the Kentucky Court of Appeals was rendered under section 296 of the Civil Code, and is not the opinion of the Court of Appeals. It is the law of the case, however, until reversed or modified by the Court

of Appeals on the final hearing. Entertaining the view we do of the importance of this opinion and its bearing on the questions here involved, especially when considered in connection with the other Kentucky cases construing similar statutes, we have considered it proper to call the court's attention thereto, and for the court's convenience we are printing said opinion in full as an appendix to this petition.

The case of E. H. Taylor, Jr. & Sons v. Craig, et al., in which Judge Sampson rendered his opinion, dissolving the preliminary injunction, will be appealed to the Court of Appeals of Kentucky and counsel representing the parties have agreed that on the 11th day of April, 1921, the first day of the April Term of the Kentucky Court of Appeals, a joint motion will be entered to docket, advance and submit said case for hearing, on the ground that a public question is involved. The Court of Appeals of Kentucky, therefore, will at an early date pass upon the validity of this statute, and, in view of its previous decisions construing similar statutes, and in view of the opinion of Judge Sampson upholding the validity of this particular statute, may we not indulge the belief with some measure of certainty that the validity of this statute will be upheld by the highest State tribunal? If the opinion of this court, therefore, is allowed to stand as a final adjudication, the State may find itself confronted with an anomalous situation, should the opinion of the Kentucky Court of Appeals be different from the opinion of this court.

CONCLUSION.

We, therefore, earnestly submit the opinion in this case should be modified or withdrawn, and appellants given a rehearing:

(1) Because the judgment purports to be a final determination, when the appeal was prosecuted under section 266 of the Code to determine whether the prelimi-

nary injunction should have been granted pending the litigation.

(2) Because the court in interpreting a State statute as affected by the State Constitution, has failed to consider or follow the decisions of the highest State tribunal construing similar taxing statutes.

(3) Because since this case was argued and submitted, a Judge of the Kentucky Court of Appeals, in dissolving a preliminary injunction granted by a State Circuit Judge, has sustained the validity of the statute here assailed, which decision in connection with the decisions of the Kentucky Court of Appeals construing similar taxing statutes, has an important bearing upon the case at bar.

All of which is respectfully submitted.

CHAS. I. DAWSON,
Attorney General.

W. T. FOWLER,
Assistant Attorney General.

CERTIFICATE OF COUNSEL.

The undersigned, counsel for Charles I. Dawson, Attorney General, and John J. Craig, State Auditor, et al., appellants in the above styled actions, do certify that the foregoing petition for a rehearing is filed in good faith and not for purposes of delay; and that in their opinion said petition is well founded in law and a rehearing should be granted.

CHAS. I. DAWSON,
Attorney General.

W. T. FOWLER,
Assistant Attorney General,
Counsel for Appellants.

APPENDIX

Copy of opinion rendered by F. D. Sampson, a Judge of the Court of Appeals of Kentucky, February 18, 1921, dissolving an injunction issued by the Judge of the Franklin Circuit Court in the case of E. H. Taylor, Jr. & Sons vs. John J. Craig, Auditor, et al., Defendants.

"This case is before me, a judge of the Kentucky Court of Appeals, on motion to dissolve the temporary injunction granted by the judge of the Franklin Circuit Court. There is involved in this motion the construction and constitutionality of an act of the last General Assembly of Kentucky entitled:

'An act imposing an annual license tax upon every corporation, association, partnership and

individual engaged in the business of manufacturing distilled spirits known as whiskey or brandy or other species of double stamp spirits in this state, and upon every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in the state, and in removing same therefrom for the purpose of sale, or for any other purpose; providing for monthly reports by distilleries and bonded warehousemen, for the purpose of ascertaining the amount of tax due; providing for monthly payments of the amount of license tax due; fixing a penalty for failure to make such monthly report and settlement; providing for the manner of distribution of the tax so collected; repealing all other license, franchise and excise taxes of the business covered by this act, and declaring an emergency to exist.'

This act is now chapter 13 of the Acts of 1920.

The plaintiff, E. H. Taylor, Jr. & Sons, is a corporation and has heretofore been engaged in manufacturing distilled spirits known as double stamp spirits at its distillery in Kentucky. In connection with its distillery it owned and operated a distillery bonded warehouse, and the liquor manufactured by the distillery was stored in the bonded warehouse of the plaintiff, after which warehouse receipts were issued against same, and these warehouse receipts from time to time in the course of trade were sold to purchasers throughout the United States and much, if not all, of the liquor now stored in the distillery bonded warehouse of the plaintiff is owned by purchasers of these warehouse receipts. Plaintiff is still operating as a warehouseman and is bottling and shipping the liquor stored in said bonded warehouse on order of its customers from time to time. The record discloses that the plaintiff has not abandoned its business as a distiller, but that it is its purpose at some future date and in more propitious times to resume the

business of distilling whiskey and selling same for the purposes now permitted by law.

The plaintiff in its petition assails the law on the ground: (1) That it is an unlawful exaction and exercise of legislative power. (2) That the law is prohibitory and confiscatory in its character. (3) That it provides for unequal taxation and violates sections 171 and 172 of the State Constitution. (4) That the act is discriminatory in its nature and adds a greater burden on whiskey than on other personal property or property of like value, and a greater burden on the business and occupation taxed by the law than on other occupations of equal and like character or value. (5) That the enforcement of the act will result in taking private property for public purposes, without just compensation and without due process of law, and will deprive the owner of such and the warehouseman in charge thereof of the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States. We shall consider these five contentions in the order stated.

The original record made in the circuit court is before me.

Inasmuch as the defendant makes no question of the jurisdiction of a court of equity to issue an injunction herein, we pass this question and proceed to a consideration of the case on its merits.

Section 1 of the act is as follows:

> "Every corporation, association, partnership and individual engaged in the business of manufacturing distilled spirits, known as whiskey or brandy or other species of double stamp spirits in this state; and every corporation, association, partnership and individual engaged in the business of owning and storing such spirits in bonded warehouses in

this state, and in removing same therefrom for the purpose of sale, or for any other purpose, shall pay an annual license tax to the Commonwealth of Kentucky of fifty cents on every proof gallon of said distilled spirits so manufactured or stored in a bonded warehouse, or withdrawn from a bonded warehouse, or transferred therefrom under bond out of the Commonwealth of Kentucky."

Section 2 of the act deals with the making of the reports by the warehouseman in whose place the liquor is stored.

Section 3 of the act is as follows:

"Every person, corporation, association or partnership operating, owning or controlling such bonded warehouses, shall, at the time said reports herein provided for are made, pay to the Auditor of Public Accounts the tax of fifty cents per proof gallon upon each proof gallon of such spirits removed from the bonded warehouse owned, controlled or operated by such person, corporation, association or partnership, or transferred under bond out of this state, up to the date of making such report; and for the purpose of securing the payment of the license taxes herein provided for, the Commonwealth shall have a lien on all such spirits stored in such bonded warehouses, together with the other property of the bonded warehousemen used in connection therewith; and in all cases where the spirits so removed or transferred were owned or controlled by another than the bonded warehouseman, then the bonded warehouseman shall collect and pay the tax due on such spirits so removed or transferred under bond, and shall be subrogated to the lien of the Commonwealth."

Section 5 of the act provides a penalty of not less than five hundred dollars nor more than one thousand dollars for persons subject to the act failing to report

and pay the tax as therein provided, and each day that the offender is in default is declared by this section to be a separate offense.

Section 7 of the act provides that the license tax imposed by the act in question shall be in lieu of all other license, franchise or excise taxes now imposed by law on persons, corporations, partnerships or associations engaged in the business covered by the act, and repeals all laws in conflict with the new act, and especially chapter 5 of the acts of the special 1917 session of the General Assembly. This act of the special 1917 session imposed a license tax of two cents per proof gallon upon every corporation, association, company, co-partnership or individual engaged in the business or occupation of manufacturing distilled spirits known as whiskey, brandy or other species of double stamp spirits in this State, and on every owner or proprietor of a bonded warehouse in this State in which such spirits are stored, and the warehouseman was required to make the reports under that law and collect and pay the tax. The privilege tax of which complaint is made is not an unlawful exaction, nor is it the result of an unlawful exercise of legislative power, as contended by plaintiff, if there is warrant in our Constitution for such legislative action, and the tax was levied by that body in the way and manner authorized by the Constitution. So the first contention of plaintiff is one involving a construction of the Constitution of Kentucky, and an inquiry whether the terms of that instrument are broad enough to warrant a privilege tax such as here involved, and this we shall first consider.

A license or excise tax may be levied for one or both of two purposes: (a) Revenue; (b) regulation under the police power. It must be admitted that the State under its police power has the right to regulate any and all kinds of business, to protect and promote the public health, morals and welfare, subject only to

the reservation of reasonable classification. 6 R. C. L. 217.

(1) It is insisted by the defendant that this is an occupational or excise tax, and as such is authorized under section 181 of the Constitution of Kentucky. This section of the Constitution, in part, and in so far as applicable, is as follows:

> "The General Assembly may, by general law only provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax."

Under this provision of the Constitution the legislature had the undoubted right to impose an occupational tax for the purpose of raising revenue; nor is the legislature required to impose a similar tax upon each and every occupation in which its citizens engage. It may tax some and exempt others. It may even go to the extent of classifying persons in the occupation taxed, and, if the classification is along reasonable and fair lines, it will not be objectionable. An occupational tax is one, not upon property, but upon the pursuit which a man chooses to acquire property and support himself or family. It is essential, however, to the constitutionality of the legislation and tax laid thereunder that it apply equally to all persons of a given class. The amount of a license tax is discretionary with the legislature, and may be fixed at any sum which will not be prohibitive. 25 Cyc. 612, 17 R. C. L., page 504. Owen County v. Cox & Co., 132 Ky. 743; Commonwealth v. Hazel, 155 Ky. 32.

In the case of Hager, Auditor v. Walker, 128 Ky., page 1, this court, in discussing the power of the legislature to tax occupations under section 181 of the Constitution, used this language:

"The authority to tax under this section is as far reaching and as sweeping as language can make it. It would be difficult to find three words that cover wider fields of employment than 'trades,' 'occupations' and 'professions.' Under its authority to tax them the General Assembly has the power and the right to tax every business and every individual in the state—the merchant, trader and banker; the lawyer, minister and doctor; the mechanic and farmer. Indeed, it would be difficult to mention a person who has not some trade, occupation or profession, and, if he has, the authority to tax him is granted and this without respect to the nature or character of the trade, occupation or profession, or whether it be humble or great, large or small. Nor does the Constitution undertake to place any limitation upon the amount of tax that may be imposed, although it may be conceded that if it shall be so unreasonable or arbitrary as to amount to a confiscation of property or a denial of the right to engage in a particular trade, occupation or profession, the courts will interpose to protect the class of persons affected from this oppressive burden, on the ground that it was a violation of the principles recognized and established in the Bill of Rights, declaring that all men have the right of seeking and pursuing their safety and happiness and the right of acquiring and protecting property. . . ."

An occupation is a vocation, calling, trade or business which one follows, or which engages one's time or attention, in whole or in part, in an effort to procure a living for himself and family. 29 Cyc. 1344. Any pursuit, calling, business or course of dealing which one may in whole or in part, adopt or pursue for gain, profit or a livelihood is an occupation within the meaning of our constitutional provision allowing the levy of a privilege tax on occupations, and the legislature has the discretion of singling out and designating any one or more of such pursuits as an occupation and subjecting it or them to a

privilege tax or taxes. If one is engaged or occupied in whole or in part for gain or profit, in investing money in spirituous liquors, with a hope of an advance in the market price, for gain, can it be said that he has no occupation? Certainly, if he engages in the manufacture of such spirits, he has an occupation. And is it not likewise true if he invests money in it, stores it in a warehouse for the purpose of ageing, mellowing and perfecting it? The owner of whiskey may store it in a warehouse or not at his option. He is not bound to do so. If he desires the privilege of storing and leaving it in a warehouse for the purpose of ageing and perfecting it, for safe-keeping, for higher prices, for the purpose of postponing the payment of the revenue and excise taxes, or for any or all of these or other reasons, he may, in the discretion of the legislature, be required to pay an excise tax for the privilege of so doing. While the mere right to acquire and own property is not generally held a subject of excise tax, any use of property so owned which is not an incident of such ownership may be the subject of a privilege tax. The storing of whiskey in a warehouse is not necessarily an incident of ownership of such property, for the owner may make other disposition of it, and the use or privilege of so storing the same may therefore be subjected to a privilege tax such as contemplated by this act. Granted that either of these things is such an occupation as may be subjected to a license or privilege tax, does it not follow that the legislature may put them all together as one business or occupation and levy a privilege tax thereon?

In discussing what constitutes a business or occupation subject to a license tax, we in the case of Greene, Auditor v. Kentenia Corporation, 175 Ky. 669, said:

> "It seems to be conceded by counsel for plaintiff that if their client was actually engaged in actively

using in any way the land which it has purchased and now owns in this state, consisting of many thousands of acres (valuable for coal and timber) that it would be competent for the state to demand and for it to pay the tax, as, according to counsel's interpretation, it would then be 'doing business' in the state. But we do not construe that phrase to be confined to such a narrow meaning. When plaintiff invested its capital in the coal and timber land which it purchased in this state, it did so for one of two purposes—that of speculation by holding the land until it naturally increased in price, or to reap a profit from it by operating it either in the way of cultivation, mining, getting timber from it, or otherwise, so as to make it profitable. It avers in its pleading that it is doing neither of the latter, and therefore it is not doing business in this state. But, according to our conception, the land need not be in actual use in order to constitute *doing business*. The average speculator in land (and there are many of them) if asked in what business he was engaged would answer: 'Speculating in land.'"

"One of the definitions of business given by Mr. Webster is 'buying and selling,' and when one, either as an individual or corporation, puts his money into land rather than other investments, his act is necessarily a choice between the various means open to him by which he may make his money yield him a profit."

So it appears that any investment made for gain or profit and which gain or profit is, in whole or part, in the future, amounts to engaging in a business or occupation within the meaning of section 181 of our Constitution, and it is competent for the legislature to impose a license tax upon such business or occupation.

While the constitutional grant to the lawmaking body of power to impose a tax on "the various trades, occupations and professions" is broad and comprehensive, yet this phrase is greatly aided and enlarged by

the further grant of the power by the same section to impose an excise tax, which is defined to be: One imposed upon an act, the engaging in an occupation or the enjoyment of a privilege. 26 R. C. L. 236; one laid on the manufacture, sale or consumption of commodities within a country, or upon certain callings or occupations, often taking the form of exactions for license to pursue them. Pollock v. Trust Co., 157 U. S. 429. Such taxes only look to a particular subject and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as the acts or dealings with which the taxes are concerned. Knowlton v. Moore, 178 U. S. 41.

In the case of Booth v. Commonwealth, 130 Ky. 105, we said:

> "'Excise' is a term of very general signification, meaning tribute, custom, tax, tollage or assessment, and in recent years the courts have so enlarged its meaning as to declare that an inheritance tax is an excise tax."

Continuing, we said in Hager, Auditor v. Walker, *supra*:

> "We believe that it is competent for the Legislature under this section (181 of the Constitution) by general law, for state purposes, as well as by a general law delegating the power to the municipalities mentioned, to divide trades, occupations and professions into classes and impose a different license fee upon each class that the trade, occupation or profession may fairly and reasonably be divided into. To illustrate: Dealers in hardware might be divided into wholesale and retail dealers. And trades, occupations and professions may be further classified according to the volume of business done by them. Nor is the General Assembly, either by general law for state purposes, or general law in aid of or for

the benefit of municipalities, required to impose the license fees that may be levied upon all trades, occupations and professions. Any one or more trades, occupations and professions may be singled out for taxation and all the others not thus selected be exempted. It will thus be seen that according to our construction of this section, it is susceptible of wide and varying application."

The case, *supra*, also expressly holds that the uniformity of taxation provided for by section 171 of the Constitution of Kentucky applies to taxation on property, and not to license taxation authorized by section 181 of the Constitution, except that every member or pursuer of a trade, occupation or profession and every subdivision and classification thereof within the jurisdiction where the tax is imposed shall bear the same license tax as every other member or pursuer of that particular calling or business. Applying the rule just stated, it will be seen that if the tax is an occupational tax, under section 181 of the Constitution, then the claim of plaintiff that it imposes unequal taxation and that it is discriminatory in its nature and adds a greater burden on the business and occupation taxed than on other occupations of equal and like character or value, is without merit. We think it may be said without hesitation that if this law can be upheld as a valid exercise of legislative authority, it must be on the theory that it is an occupational or excise tax and not a property tax. Viewed as a property tax, it would undoubtedly violate sections 171 and 172 of the Constitution of Kentucky, providing for equality and uniformity in taxation; and, moreover, to hold it to be a property tax would be to reach a conclusion wholly at variance with the plain purpose and expressed intention of the legislature.

It therefore becomes important to determine whether or not the legislation is justified under section 181 of the

Constitution, above quoted. It is the claim of the plaintiff that the law in question singles out and taxes three separate and distinct occupations, namely: (a) distilling; (b) storing in bonded warehouses; and (c) removing whiskey from bonded warehouses; and that to tax the acts of owning and storing in bonded warehouses as an occupation, is undertaking to tax as an occupation something not contemplated as an occupation under section 181 of the Constitution, and that this attempt of the legislature to declare such acts to be an occupation is capricious and unreasonable. We do not concur in this view. The use of property of certain classes, especially luxuries such as whiskey, has always been considered a proper subject of excises. Hylton v. U. S., 3 Dall. 171, U. S. (L. Ed.) 556; 26 R. C. L. 236. It is not ownership which is the subject of taxation, but the election during the taxing period of the owner to take advantage of one of the elements which are involved in ownership, namely, the right to use it. 26 R. C. L. 236. Taking the whole act together, we are of the opinion that the legislature was attempting to impose an occupational tax upon the one entire business of manufacturing, storing and preparing distilled spirits for the market, and that it was not the intention of the legislature to tax the business of distilling as one occupation, storing in bond as another occupation, and removing from bond as a third occupation, except in cases where the act of manufacturing is completed but the liquor yet remains in storage unreleased from bond. It appears from a reading of the United States Statutes relating to the manufacture and warehousing of double stamp spirits that the manufacturer may or may not place his product in a warehouse, as he may deem best, provided he complies with the law in that respect. He is not, however, exempt from the privilege tax imposed by this statute under consideration, if he decides to dispose of his liquor without

warehousing it, but if he does so dispose of it and pays the tax thereon to the State, as provided in this act, such liquor is not again subject to tax under this act, as only one tax of fifty cents on the gallon can be exacted. We think the real purpose of the legislation in question was to tax the one continuous business as one business, and leave to each of the agencies engaged therein the adjustment of the payment of same among themselves, the legislature for obvious reasons making the warehouseman the collector of the tax. Section 3 of the act in question clearly shows that it was the purpose of the legislature that only the one tax of fifty cents per proof gallon for the entire business should be collected, as it provides that the warehouseman at the time the reports showing the release of whiskey from the bonded warehouse are made shall pay to the Auditor the tax of fifty cents per proof gallon upon each proof gallon of spirits removed from the bonded warehouse, owned or operated by such person, or upon each proof gallon of spirits transferred from such warehouse out of the State. There is nothing whatever in this section to indicate that it was the purpose of the law to require the warehouseman to collect or pay but the one fifty cent tax per gallon on all the whiskey that was placed in and passed out of his warehouse, regardless of by whom it was withdrawn. This construction of the law is in harmony with the construction of the act of the special session of 1917, which this law repeals. It is a matter of general knowledge in this State that under the act of the special session of 1917 only the one tax of two cents per gallon was collected upon each gallon of distilled spirits placed in and removed from bonded warehouses.

For the reasons indicated, and without passing upon the right of the legislature to tax as an occupation the single acts of owning and storing liquor in bonded warehouses, we are of the opinion that this tax

was intended to be and fairly construed is a tax upon the entire business of distilling and preparing whiskey for market, which includes the business of storing in bonded warehouses, and as such is within the scope of section 181 of the Constitution, provided, of course, it is not prohibitory or confiscatory in its character.

(2) It is contended by the plaintiffs that if the tax is viewed as an occupational tax it is invalid and unconstitutional, for the reason that it is so large as to be prohibitory and confiscatory, by which is meant that the excise tax is so great as to amount to a virtual taking of the property of plaintiff and other owners of liquor without just compensation, or, if not that, then the excessiveness of the tax will so greatly increase the price of such liquor as to repel prospective purchasers and thus, in effect, prohibit the sale of the stored liquor and ruin the business or occupation taxed. It is well settled in Kentucky that while the power to impose a license tax on occupations and trades, under section 181 of the Constitution is very comprehensive, it is not an unlimited power. Only those excise laws whose general operation is confiscatory and oppressive are unconstitutional. 26 R. C. L. 238. It is generally agreed, however, that the amount of a license tax is a matter in the discretion of the legislature, and courts will not review the action of the lawmakers, unless an abuse of discretion is apparent. 17 R. C. L. 557; Hall v. Commonwealth, 101 Ky. 382; Tobacco Co. v. City of Hopkinsville, 174 Ky. 189. This doctrine is well stated in an opinion by the Supreme Court of Tennessee in the case of Knoxville, &c., O. R. Co. v. Harris, reported in 99 Tenn. 684, and 53 L. R. A. 930, wherein it is said:

> "If the legislature has the legal right to impose a privilege tax the amount of the imposition is a matter within its discretion. 'Our only concern is

with the validity of the tax; all else lies beyond the domain of our jurisdiction.' Delaware Railroad Tax, 18 Wall 231, sub nom.; Minot v. Philadelphia W. & B. R. Co., 21 L. Ed. 896; California v. Central P. R. Co. 127 U. S. 1, 41, 32 L. Ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. Ed. 1025, 10 Sup. Ct. Rep., 503; Jenkins v Ewin, 8 Heisk, 477."

The Supreme Court of the United States has held that it is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount or the property upon which it is imposed. Patton v. Brady, 184 U. S. 608. And further, that though an excise tax is so onerous as to amount to a destruction of the business, or even if intended to do so, it is within the power of Congress and the courts have no power to revise its judgment. McCray v. U. S., 195 U. S. 27. In stating the rule in the case of Owen Co. v. Cox & Co., 132 Ky. 238, we said: "The reasonableness of a license fee imposed as a tax is a question for the taxing power, and the courts will not interfere with its discretion unless the tax shall amount to a prohibition of a useful or legitimate business." The tax may not, however, be so excessive under our rule as to be prohibitive of the business, and this is the sole test. It is not prohibitive, and therefore not unconstitutional, if the business can be carried on with reasonable profit. A great deal of proof in the way of affidavits was introduced both by the plaintiffs and by the defendants on the hearing of the motion before the circuit judge, all of it being on the question of whether or not the tax in practical operation was prohibitive of the business taxed.

One of the reasons assigned by the plaintiff for contending that the tax is prohibitive involves a construction of the statute. It will be noted that in the title and in section 1 of the act the word "annual" is used in con-

nection with the words "license tax," and it is suggested by plaintiff that this language imposes a tax of fifty cents per proof gallon for each proof gallon of spirits stored in a bonded warehouse for each year same may remain in such warehouse. We can not agree with this construction of the statute. The act when taken as a whole clearly shows that the tax is not cumulative, increasing at the rate of fifty cents for each year the whiskey may remain in a bonded warehouse. In a sense the tax is an annual license tax, and the amount of this annual license tax is determined by multiplying the number of proof gallons removed in any one year from bond by fifty cents per gallon. Had the legislature intended that the tax should be a cumulative one, at the rate of fifty cents per gallon per year, it would have provided in the law some means by which the Auditor, who is the collecting agent of the State, could have known how many years each gallon removed from bond had remained in bond and subject to the tax. To hold that the tax is an annual cumulative one would necessarily result in rendering the law invalid, on the ground that it would be prohibitive. The statute is clearly open to another and more reasonable construction, as pointed out above. It is the duty of a court, where a law is capable of two constructions, one of which will render it valid and the other invalid, to adopt that construction which will sustain the validity of the law, if such a construction does not do violence to the plain purpose of the legislature in enacting the law. The purpose of this legislation, manifestly, was twofold: (1) To regulate the business of manufacturing, storing and releasing liquors under the police power of the State; (2) to raise revenue. The construction we are putting upon it will, unquestionably, facilitate both these purposes. Moreover, the presumption is that an act of the legislature is within that body's rights under the Constitution. All reasonable intend-

ment should be in favor to its fairness and justice. 36 American Reports 518; Gray on Taxation, page 720. Courts will not, therefore, adopt a construction of a statute which will invalidate it if there is another construction of which the statute is reasonably susceptible. 6 R. C. L. 78, 101; Standard Oil Co. v. Commonwealth, 82 S. W. 1020; 25 Cyc. 612.

As was said in the case of Weyman v. City of Newport, 153 Ky. 491:

> "In the construction of ordinances the intention of the law-making department should be carried out, if this can be done consistently with the fair reading of the ordinance, and likewise an ordinance should be so construed as to sustain its validity when it is reasonably susceptible of this construction.
>
> "In other words, if an ordinance is open to two constructions, one of which would uphold its validity and the other defeat it, that construction will be adopted which will sustain the validity of the ordinance."

We can not on the proof contained in the record hold that the tax is prohibitive of the occupation taxed. We think, taking the entire record on this point, it shows that the owners of liquor stored in bonded warehouses in Kentucky, whether they be distillers or whether they be holders of warehouse receipts, are able and have been able during all the time the law has been in effect to dispose of the product owned by them at a fair and reasonable profit.

It appears from the affidavit of G. J. Jarvis, tax clerk in the Auditor's office, that there have been removed from bond and the fifty cent tax collected on more than four million gallons of whiskey from the date the law became effective in March last up to the first day of December, 1920. The record further discloses that at the time the law became effective a fair and reasonable

price for whiskey, when sold through the medium of warehouse receipts, was one dollar to one dollar and twenty-five cents per gallon, regardless of whether it was stored in Kentucky or elsewhere. It appears from the proof that the same price is now being obtained by the owners of liquor stored in Kentucky, when it is sold through the medium of warehouse receipts, the purchaser assuming and paying the tax. The profit to the owner is, therefore, the same now as before the imposition of the tax when it was not only fair but entirely satisfactory to the seller. It further appears that for whiskey stored outside of Kentucky the owners are realizing from one dollar and fifty cents to as high as two dollars per gallon for same, when sold through the medium of warehouse receipts. This would indicate that owners of liquor stored outside of Kentucky have taken advantage of the law to profiteer and secure for themselves an additional profit, but not with a purpose to nor have they put the owners of Kentucky stored liquors out of business. The owner of Kentucky stored whiskey is able to and does pass the tax on to the consumer without reducing his profit below the margin he was making at the time of the effective date of the law. The record further shows that by bottling his whiskey in bond, the owner of Kentucky stored whiskey can sell same in the market at a still larger profit, and that many of the owners of liquor are adopting this plan of disposing of their stock. The tax is, therefore, clearly neither prohibitory nor confiscatory of the business, as it affects the liquor now on hand.

Plaintiff insists, however, that while the tax may not be so heavy as to prevent the disposition of the stocks of liquor now on hand, that it will prevent it resuming business after the present stock has been disposed of; that whiskey can be manufactured in other states as cheaply as it can be manufactured in Kentucky, and that dis-

tilleries will start up in other states, and by reason of the fifty cent tax imposed by Kentucky plaintiff will be unable to meet outside distillers in price competition. It is difficult for the court to believe that the competition will be as keen in the whiskey business after the disposition of the stocks now on hand as it is now, but, however that may be, the court could only speculate as to conditions which will then obtain. A court is not authorized to enter the realm of speculation in order to hold a law unconstitutional.

(3) The act does not, in the light of what has already been said, violate section 171 of our Constitution, which provides for uniformity of taxation, for, as we have already pointed out, it is not lacking in equality or uniformity if it places the same burden upon all persons or corporations embraced in a given class or subdivision thereof engaged in the designated business or occupation taxed. Weyman v. City of Newport, 153 Ky. 487; Smith v. Commonwealth, 175 Ky. 299. Moreover, it is generally held that the requirement of equality or uniformity does not apply to occupational or privilege taxation, but only to taxation of property or persons. Gray on Taxation, page 702.

(4) Neither is the statute open to the charge of discrimination against the business taxed, for a license tax is not discriminatory within the meaning of that prohibition if it does not arbitrarily or capriciously impose a different fee or license upon different members of the same class. The rule is well stated as follows in 17 R. C. L., pages 507, 508, 138 Ky. 738:

> "Generally speaking, the state, acting on occupations carried on within the state, may encumber some of them with a tax or license fee, and leave other occupations, dissimilar in tendency, though not in nature, to the free will of those who might

be inclined to engage in them. It is essential, however, to the constitutionality of such tax laws that they apply equally to all persons of a given class. If the tax so applies it is sufficiently uniform and equal, but a tax which discriminates between different members of a class or exempts certain members of a class is void."

(5) Any tax is, in a sense, a taking of private property for public purposes, but, nevertheless, the right to levy and collect taxes inheres in sovereignty.

"Regulations respecting the pursuit of a lawful trade or business, being an exercise of the police power, are within the authority of the state, and form no subject for federad interference unless they are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily and in a manner wholly arbitrarily interfered with or destroyed without due process of law, or unless other constitutional rights are impaired or destroyed."

It is argued for plaintiff that this is an *ex post facto* law and therefore unconstitutional, but this can not be, for only criminal statutes which relate back and impose penalties or create new crimes are *ex post facto* in their ntaure, within the meaning of the Federal Constitution.

"*Ex post facto* laws differ from retroactive laws. The latter, when imposing taxes or providing for their assessment and collection, are not forbidden by the Constitution; the former, in that Constitution, has reference to criminal punishment only; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 31 Sup. Ct. 171, 35 L. Ed. 137."

If, as to the manufacture of whiskey, the act imposing this excise tax is retrospective, that of itself does not invalidate it. 12 Corpus Juris, 1090, 127 Ky. 667;

120 Ky. 739. Kentucky Union Co. v. Kentucky, *supra*. The occupation taxed is that of manufacturing, storing and releasing whiskey as one complete business, and so long as any part of this operation is going on, the occupa- is pursued and may be taxed.

We are not impressed with the contention that the penalties provided in the act for its violation are so excessive as to render the law invalid. The general rule is, that where a means is furnished by which a law may be tested in the courts without those subject to the penalties incurring the penalties, should the suit be decided adversely to the complaining party, penalties sufficiently heavy to effect the purposes for which the law was enacted may be imposed. St. Louis, L. M. & S. Railway Co. v. Williams, et al., 40 Sup. Ct. Rep. 71; Waddy v. Southern Railway Co., 235 U. S. 67, 59 L. Ed. 405; Gulf, Colorado & Santa Fe Railway Co. v. State of Texas, 246 U. S. 58, L. Ed. 574.

Section 162 of Kentucky Statutes provides as follows:

> "When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed."

In the cases of Craig, Auditor v. Security Producing & Refining Company, 189 Ky. 565, and Craig, Auditor v. Frankfort Distilling Company, decided November 23,

1920, it was held that where taxes are paid under a void or unenforcible statute, and where the payment is made directly to the Auditor or directly into the State treasury, the person paying such taxes, by applying to the Auditor within two years from the date of payment, may have such taxes refunded. Under this statute, as interpreted by this court, a means is afforded of testing the validity of the law without incurring any of the penalties provided for in the act, and without the person paying the taxes sustaining any loss. The tax may be paid, and then demand made upon the Auditor that same be refunded, and, upon the failure of the Auditor to refund, a suit may be brought against the Auditor to compel him to issue his warrant for the taxes claimed to have been wrongfully collected, and in that suit the question of the constitutionality of the statute may be determined. This would not lead to a multiplicity of suits, as the test could be made on one payment for the purpose of determining the law, and, if it should be determined in that case that the taxpayer is entitled to a refund, it would then be the duty of the Auditor to refund, not only the tax embraced in the suit, but upon proper demand he should refund any subsequent payments made under the same law, his duty to refund having been definitely settled, in the opinion in the case cited above. Aside from this, we are not prepared to say that the penalty provision of the act is an inseparable part of the act.

From the record we learn that Kentucky whiskey has been selling and removing from warehouses so actively that in the short time between the effective date of the act and the commencement of this litigation a very large amount passed to consumers. At the same rate we estimate that several million gallons of whiskey have been released from warehouses in Kentucky since the law took effect. On all this a tax of fifty cents per gallon is due, amounting to millions of dollars. As the distiller

and warehouseman passed the tax on to the consumer, and demanded and obtained in addition to the tax the same price for their goods which prevailed before the tax law was enacted, these millions of tax money now in the depositories subject to the orders of the court, belong either to the State of Kentucky as excise or to the consumers of the whiskey who paid the tax, and in no event to the distillers or warehousemen who have already received the full price of their goods, and only collected the funds now in litigation as taxes and not as a part of the price of the goods sold. It follows that neither the money nor property of the distillers or warehousemen is either taken or threatened in this litigation.

Having reached the conclusion herein announced, it necessarily follows that plaintiff's claim that its property is being taken without due process of law and without just compensation is without merit.

This injunction granted by the lower court is dissolved.

F. D. Sampson,
Judge Kentucky Court of Appeals.

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